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In the
Supreme Court of the United States.

OCTOBER TERM, 1979.

No. 79-1063

STEPHEN F. KEEFE AND
FRANCIS J. MOORE, III,
PETITIONERS,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

THOMAS C. TROY,
EDWARD J. MCCORMICK, III,
TROY & COLLINS,
51 Neponset Avenue,
Dorchester, Massachusetts 02122.
(617) 825-8122

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

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Introduction.

The petitioners, Stephen F. Keefe and Francis J. Moore, III, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit in the above entitled case.

Opinions Below.

The opinion of the Court of Appeals for the First Circuit is unreported. It is reproduced in the appendix to this petition (pp. 1a-2a). The opinion of the District Court for the District of New Hampshire is unreported. It is reproduced in the appendix in this petition (pp. 3a-9a).

Jurisdiction.

The judgment of the Court of Appeals was entered on December 7, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented.

Petitioners Keefe and Moore were the subject of a subpoena commanding them to appear before a federal grand jury sitting for the District of New Hampshire. Petitioners filed a motion to quash which was denied. After being asked certain questions relating to marijuana importation, petitioners asserted their privilege against self-incrimination. At this point, both petitioners were granted immunity pursuant to 18 U.S.C. §§ 6001-6003. The petitioners, relying on their Fifth Amendment privilege, refused to answer, fearing any answer they gave might provide a link in the chain of evidence against them in a foreign prosecution, specifically Colombia. Petitioners were found in contempt by the District Court on November 15, 1979. Their motion for bail pending appeal was denied.

Before receiving the above-described subpoena, petitioners had pled guilty to a charge of possession with intent to distribute marijuana. After obtaining new counsel, petitioners filed a pre-sentence motion to withdraw said plea. This motion was denied and is currently pending appeal to the First Circuit Court of Appeals.

The questions presented are:

1. Whether the privilege against self-incrimination can be asserted to protect a witness from criminal prosecution in a foreign jurisdiction?

2. If so, whether the petitioners have shown a "real and substantial" threat of foreign prosecution?

3. Whether the government should be precluded from calling petitioners before the grand jury pending the determination of their appeal of the denial of their motion to withdraw a plea of guilty?

Constitutional, Statutory, and Rules Provisions Involved.

This case involves:

1. The Fifth Amendment to the Constitution of the United States, the pertinent part follows: "No person . . . shall be compelled in any criminal case to be a witness against himself."

2. Rule 6 of the Federal Rules of Criminal Procedure (App. 29a).

3. 18 U.S.C. §§ 6001-6003 (App. 30a-32a).

4. Extradition Treaty between the United States of America and the Republic of Colombia, signed September 14, 1979. (Subject to ratification.) (App. 9a.)

5. The following Colombian statutes (summarized at App. 28a-29a):

A. Article 38 of Decree 1188 of June 25, 1974.
B. Article 208, Colombian Penal Code.
C. Article 211, Colombian Penal Code.
D. Articles 16, 17 and 19, Colombian Penal Code.

Statement of the Case.

The petitioners were the subject of a subpoena commanding their appearance before a federal grand jury for the District of New Hampshire. After their motion to quash said subpoena was denied, petitioners were asked certain questions before the grand jury (App. 26a, 27a). Upon the advice of counsel, petitioners asserted their privilege against self-incrimination. Petitioners were then granted immunity pursuant to 18 U.S.C. §§ 6001-6003 (App. 30a-32a).

Petitioners again asserted their privilege against self-incrimination, claiming that the immunity granted was insufficient to protect them effectively in any prosecution against them in the nation of Colombia. In support of this contention, petitioners point to the statement made by the Assistant United States Attorney at time of sentencing. The substance of this statement was that the matter involved was a large-scale narcotics operation stemming from Colombia (App. 27a-28a).

Petitioners were found in contempt by the District Court on November 15, 1979. They were denied bail and have been incarcerated since November 17, 1979.

After briefs and oral argument, the First Circuit Court of Appeals upheld the contempt, finding that petitioners had not shown a "real and substantial" threat of foreign prosecution (App. 1a-2a).

Reasons for Granting the Writ.

The issue of whether the Fifth Amendment privilege against self-incrimination applies to threats of prosecution in a foreign nation has been discussed twice in the last sixteen years, the cases being *Murphy* v. *Waterfront Commission of New York Harbor*, 378 U.S. 52 (1964), and *Zicarelli* v. *New Jersey Commission of Investigation*, 406 U.S. 472 (1972). This Court failed to decide the issue in *Zicarelli* v. *New Jersey Commission of Investigation*, *supra*, finding that it need not decide on the issue as petitioner had not demonstrated a "real and substantial" threat of foreign prosecution. Thus, the Supreme Court has never ruled on this issue involving one of the most basic guarantees granted by the Constitution. For this and for the following reasons, petitioners' writ should be granted.

1. As the issue has never been decided, there is a clear and distinct need for clarification of this issue. As crimes and investigations take on more and more international implications, the need for specific guidelines on this issue becomes imperative. The lower courts, government attorneys, and defense attorneys need to have a beacon from which to guide their decisions and actions.

2. There appears to be a split in authority regarding this issue among the circuit courts. Although no circuit court has decided whether the privilege can be so asserted (but see *In re Cardassi*, 351 F. Supp. 1080 [D. Conn. 1972]), the reasons for denying such a claim have been varied and inconsistent. Some courts have relied on the theory that there must be a "real and substantial" threat. See, e.g., *In re Quinn*, 525 F.2d 222 (1st Cir. 1975); *United States* v. *Yanagita*, 552 F.2d 940, 946 (2d Cir. 1977); others have stressed the protection attempted by Rule 6(e) of the Federal Rules of Criminal Procedure (App. 29a-30a). *In re Grand Jury Proceedings, United States* v. *Postal*, 559 F.2d 234, 236 (5th Cir. 1977); *In re Federal Grand*

Jury Witness, United States v. *Lemieux*, 597 F.2d 1166, 1168 (9th Cir. 1979). Thus, there is a need for a clarification of policy and rationale.

3. A survey of the law shows that petitioners have indeed shown an exceedingly strong claim that they face a "real and substantial" threat of foreign prosecution. Among the factors used to determine whether a witness faces a real threat of foreign prosecution are:

> a) The nature of the propounded questions. (Here the questions propounded relate directly to marijuana importation and not just activity inside the United States.) (See App. 27a.) *Zicarelli* v. *New Jersey Commission of Investigation, supra.*
>
> b) Whether or not a witness has been able to specifically refer to the foreign statutes under which he reasonably fears prosecution. (See App. 28a for summaries of the applicable Colombian statutes.) *In re Quinn, supra.*
>
> c) Whether or not there is any indication that the foreign authorities were interested in initiating prosecution. (See App. 9a; the recent extradition treaty between the United States and Colombia clearly shows this inclination.) *United States* v. *Yanagita, supra.*

Here then, this unresolved issue is squarely raised. Petitioners submit that its public importance is obvious, and that it was wrongly disposed of below.

Conclusion.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

THOMAS C. TROY,
EDWARD J. McCORMICK, III,
TROY & COLLINS,
51 Neponset Avenue,
Dorchester, Massachusetts 02122.
(617) 825-8122

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United States Court of Appeals for the First Circuit.

No. 79-1618

IN RE STEPHEN FRANCIS KEEFE,
PETITIONER.

No. 79-1619

IN RE FRANCIS JOSEPH MOORE,
PETITIONER.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE

[Hon. Shane Devine, *U. S. District Judge*]

Before Coffin, *Chief Judge*,
Campbell and Bownes, *Circuit Judges*.

Edward J. McCormick, with whom *Thomas C. Troy*, *Jack Baccari*, and *Troy & Collings* were on brief for appellants.

Robert T. Kennedy, Assistant U.S. Attorney, with whom William H. Shaheen, United States Attorney, was on brief for appellee.

December 7, 1979.

Per Curiam. Stephen Keefe and Francis Moore appeal the district court's denial of their motion to quash a subpoena commanding them to testify before a federal grand jury, the court's order holding them in contempt for their refusal to respond to questions despite a grant of use immunity pursuant to 18 U.S.C. §§ 6002, 6003, and the court's denial of bail pending this appeal of their contempt citations.

Appellants' principal argument is that the grant of use immunity is insufficient to protect them from the threat of foreign prosecution, here by Colombian officials. With the benefit of oral argument by able counsel and after review of the briefs and record, we are unpersuaded that appellants have made the preliminary showing of a "real or substantial danger of foreign prosecution" required by *In re Quinn*, 525 F.2d 222, 223 (1st Cir. 1975). *See Zicarelli* v. *New Jersey Investigation Commission*, 406 U.S. 472 (1972). Thus we need not determine whether in an appropriate case a witness could refuse to testify on the ground asserted.

Appellants further contend that as they are currently appealing their convictions in a related criminal case, they should not be called upon to testify before the grand jury pending the outcome of that appeal. The short answer to this contention is that even were appellants successful in vacating their convictions, the government, because of the grant of use immunity, would be precluded from using the grand jury testimony or any evidence derived therefrom at a new trial. *See In re Liddy*, 506 F.2d 1293, 1301-02 (D.C. Cir. 1974).

Particularly in view of our present disposition, we do not find any merit in appellants' contention that bail should have been allowed pending the outcome of this appeal. *See* 28 U.S.C. § 1826(b).

Affirmed.

United States District Court for the District of New Hampshire.

In re Grand Jury Proceedings,
Stephen Francis Keefe — Misc. No. 79-39

In re Grand Jury Proceedings,
Francis Joseph Moore, III — Misc. No. 79-40

Order.

These cases involve attempts by the Government to compel Stephen F. Keefe and Francis J. Moore to testify before the Grand Jury in the District of New Hampshire regarding a scheme to distribute a large quantity of marijuana.[1] Keefe and Moore were served on October 9, 1979, with subpoenas commanding them to appear before the Grand Jury on October 29, 1979. Based on his judgment that the testimony or other information from these individuals may be necessary to the public interest and that such individuals would likely refuse to testify or provide other information on the basis of their privilege against self incrimination, the United States Attorney moved on October 22, 1979, that the Court issue orders of immunization compelling their testimony pursuant to 18 U.S.C. § 6001, *et seq*. Such orders were issued by the Court on Octo-

[1] Keefe and Moore entered pleas of guilty to charges related to such scheme on August 28 and 29, 1979. Their motions filed September 17, 1979, to withdraw such pleas were denied by the Court on October 4, 1979, and they were sentenced thereon on October 9, 1979. Appeal of the Court's Order of October 4, 1979, is currently pending before the First Circuit Court of Appeals.

ber 23, 1979. On October 29, 1979, counsel for Keefe and Moore appeared before Judge Loughlin and stated that if their clients were called to testify before the Grand Jury on that date, they would refuse to so testify based on their Fifth Amendment privilege against self incrimination.[2] Moreover, on that same date Keefe and Moore filed motions to quash the subpoenas, citing as grounds therefor the inadequacy of the use and derivative use immunity already granted them to prevent the use of their testimony in a later prosecution if their appeal is granted regarding withdrawal of their guilty pleas, or to protect them from possible criminal prosecutions by state or foreign authorities or IRS officials based on such testimony. A hearing was held on such motions on November 5, 1979, at which time Keefe and Moore's counsel further argued that the procedure whereby the immunization orders of October 23, 1979, were obtained rendered them invalid.[3]

Under 18 U.S.C. § 6002, once an order of immunization to compel testimony has been communicated to a witness pursuant to the terms of 18 U.S.C. § 6001, *et seq.*,

> the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

[2] Thereafter on November 2, 1979, the Government filed petitions with the Court to hold Keefe and Moore in contempt as recalcitrant witnesses pursuant to 28 U.S.C. § 1826.

[3] At the hearing, counsel for Keefe and Moore waived their previously filed claims that the subpoenas were defective on their face.

In *Kastigar* v. *United States*, 406 U.S. 441, 453 (1972), *rehearing denied* 408 U.S. 931 (1972), the United States Supreme Court held that "such immunity from use and derivative use is coextensive with the scope of the privilege against self-incrimination, and therefore is sufficient to compel testimony over a claim of privilege." In response to arguments, similar to those raised here, that such immunity would not adequately protect the witness from various possible incriminating uses of the compelled testimony, the Court in *Kastigar* further noted that

> This total prohibition on use provides a comprehensive safeguard, barring the use of compelled testimony as an 'investigatory lead,' and also barring the use of any evidence obtained by focusing investigation on a witness as a result of his compelled disclosures.
>
> A person accorded this immunity under 18 U.S.C. § 6002, and subsequently prosecuted, is not dependent for the preservation of his rights upon the integrity and good faith of the prosecuting authorities. As stated in *Murphy* [v. *Waterfront Com'n*, 378 U.S. 52 (1964)]:
>
> > 'Once a defendant demonstrates that he has testified, under a state grant of immunity, to matters related to the federal prosecution, the federal authorities have the burden of showing that their evidence is not tainted by establishing that they had an independent, legitimate source for the disputed evidence.' 378 U.S., at 79 n. 18.
>
> This burden of proof, which we reaffirm as appropriate, is not limited to a negation of taint; rather, it imposes on the prosecution the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony.

This is very substantial protection, commensurate with that resulting from invoking the privilege itself.

Id., at 460-61 (footnotes omitted). Such protection would inhere in a retrial, should Keefe and Moore's pending appeal be successful. *In re Liddy*, 506 F.2d 1293, 1301 (D.C. Cir. 1974). And in any other federal criminal proceedings against Keefe and Moore, the prosecution would similarly be faced with "the heavy burden of proving that all of the evidence it proposes to use was derived from legitimate independent sources." *Kastigar*, *supra*, 406 U.S. at 461-62. Keefe and Moore's contention that their compelled statements might so prejudice their defense at a possible trial as to violate due process is similarly without merit, for the United States Supreme Court has recently held in *New Jersey* v. *Portash*, 99 S.Ct. 1292, 1297 (1979) that "a person's testimony before a grand jury under a grant of immunity cannot constitutionally be used [even] to impeach him when he is a defendant in a later criminal trial."

As to Keefe and Moore's fears that federal grand jury testimony "may well be furnishing a link in the chain of evidence that could be used to prosecute [them] for . . . State crimes," the First Circuit has noted in *In re Bianchi*, 542 F.2d 98, 101 (1st Cir. 1976): "The requirement that every sovereign, state or federal, recognize immunity granted by another sovereign . . . protects appellant from the use of his grand jury testimony in any state prosecution," citing *Murphy* v. *Waterfront Comm'n*, *supra*, 378 U.S. at 79. *Accord*, *United States* v. *Armstrong*, 476 F.2d 313, 316 (5th Cir. 1973); *United States* v. *Watkins*, 505 F.2d 545, 546 (7th Cir. 1974). "Thus appellant's remedy is not to remain silent, but to raise the issue of his immunity in the state proceeding." *In re Inzirillo*, 542 F.2d 90, 91 (1st Cir. 1976).

With respect to Keefe and Moore's contention that their testifying in front of the grand jury might provide a basis for possible criminal liability in a foreign jurisdiction notwithstanding their immunity here, some courts have ruled that the secrecy of grand jury proceedings, especially as provided for in Rule 6(e) of the Federal Rules of Criminal Procedure, is a sufficient safeguard against any danger of foreign prosecution. *In re Federal Grand Jury Witness*, 597 F.2d 1166, 1167 (9th Cir. 1979); *Armstrong*, *supra*, 476 F.2d at 316; *In re Tierney*, 465 F.2d 806, 811-12 (5th Cir. 1972), *cert. denied*, 410 U.S. 914 (1973). Others have been less trusting of the ability of American courts to use Rule 6(e) as an effective protection against foreign use of compelled testimony. *See In re Cardassi*, 351 F. Supp. 1080 (D. Conn. 1972); *In re Federal Grand Jury Witness*, *supra*, 597 F.2d at 1168 (Hufstedler, J., concurring). We need not engage in an extended discussion of the merits of these positions in order to dispose of Keefe and Moore's contention here. The rule in this Circuit states that such claims must fail when the prospective witness fails to particularize any real or substantial danger of foreign prosecution. *In re Quinn*, 525 F.2d 222, 223 (1st Cir. 1975).[4] In these cases, Keefe and Moore do not assert that they engaged in compromising conduct while present on foreign soil and subject to foreign criminal jurisdiction. Nor have they identified any foreign criminal statute under which they reasonably fear prosecution for conduct to which the questions might relate.[5] *Id.* Under such

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[4]Unlike the witness in *Quinn*, *supra*, the prospective witnesses here have not yet heard the questions which they contend may raise matters of concern to a foreign jurisdiction. From all that has preceded these proceedings, however, it is clear what the scope of the Government's grand jury inquiries will be.

[5]See also November 2, 1979, affidavit of Assistant United States Attorney Robert T. Kennedy, paragraph 3.

circumstances, the Court rejects their contention in this regard.

As to Keefe and Moore's assertions that the Court's immunization orders of October 23, 1979, were procedurally defective, it must be noted at the outset that the stated judgment of the United States Attorney — that the testimony or other information from these individuals may be necessary to the public interest — is unreviewable. *In re Maury Santiago,* 533 F.2d 727, 728-29 (1st Cir. 1976). However, the Court has reviewed *in camera* the communication from the United States Attorney to the Criminal Division of the Department of Justice requesting authorization to comply for compulsion orders and has examined the replies thereto from the Assistant Attorney General approving the request. The Court finds no irregularities in the process whereby these approvals were obtained and perceives no ground upon which to invalidate its October 23, 1979, orders of immunization compelling the testimony before the grand jury of Keefe and Moore.

For all of the above reasons, Keefe and Moore's October 29, 1979, motions to quash the subpoenas directing them to appear and give testimony before the grand jury are hereby denied. Currently pending before the Court are the Government's petitions filed November 2, 1979, to hold Keefe and Moore in contempt as recalcitrant witnesses pursuant to 18 U.S.C. § 1826. Said petitions were grounded on the representations made by Keefe and Moore's counsel before Judge Loughlin on October 29, 1979, to the effect that they would refuse to testify before the grand jury, at least on that date, based on their Fifth Amendment privilege against self incrimination. At the hearing before this Court on November 5, 1979, however, counsel for Keefe and Moore refused to stipulate that their recalcitrance would continue if their motions to quash were denied and further represented that their clients could not so state their intentions until provided by the United

States Attorney with a list of questions expected to be asked of these prospective witnesses before the grand jury. This Court will not interrupt the ordinary course of proceedings by ordering the United States Attorney to provide such a list, but will refrain from ruling upon the Government's petitions to hold Keefe and Moore in contempt until after they have either appeared before the grand jury and refused to testify, as was the case with the former co-defendants in this matter, or have refused to appear altogether.

So ORDERED.

SHANE DEVINE,
Chief Judge
United States District Court

November 9, 1979.

Extradition Treaty between the United States of America and the Republic of Colombia.

The Government of the United States of America and the Government of the Republic of Colombia,

Desiring to provide for more effective cooperation between the two States in the repression of crime; and

Desiring to conclude a new Treaty for the reciprocal extradition of offenders;

Have agreed as follows:

ARTICLE 1

Obligation to Extradite

(1) The Contracting Parties agree to extradite to each other, subject to the provisions described in this Treaty, persons

found in the territory of one of the Contracting Parties who have been charged with an offense, found guilty of committing an offense, or are wanted by the other Contracting Party for the enforcement of a judicially pronounced penalty involving a deprivation of liberty for an offense, committed within the territory of the Requesting State.

(2) When the offense has been committed outside the territory of the Requesting State, the Requested State shall grant extradition, subject to the provisions of this Treaty, if:

(a) Its laws would provide for the punishment of such an offense in similar circumstances; or
(b) The person sought is a national of the Requesting State, and that State has jurisdiction to try that person.

ARTICLE 2

Extraditable Offenses

(1) Extraditable offenses under this Treaty are:

(a) Offenses described in the Appendix to this Treaty which are punishable under the laws of both Contracting Parties; or
(b) Offenses, whether listed in the Appendix to this Treaty or not, provided they are punishable under the Federal laws of the United States and the laws of the Republic of Colombia.

(2) For the purposes of this Article, it shall not matter whether or not the laws of the Contracting Parties place the

offense within the same category of offenses or denominate an offense by the same terminology.

(3) Extradition shall be granted in respect of an extraditable offense only if the offense is punishable under the laws of both Contracting Parties by deprivation of liberty for a period exceeding one year. However, when the request for extradition relates to a person who has been convicted and sentenced, extradition shall be granted only if the duration of the penalty still to be served amounts to at least six months.

(4) Subject to the conditions set out in paragraphs (1), (2), and (3) extradition shall also be granted:

(a) For attempting to commit an offense or participating in the commission of an offense. Extradition shall also be granted for association to commit offenses as provided by the laws of Colombia and for conspiracy to commit an offense as provided by the laws of the United States.
(b) For any extraditable offense when, for the purpose of granting jurisdiction to either Contracting Party, transportation of persons or property, the use of the mails or other means of carrying out interstate or foreign commerce is also an element of the specific offense.

(5) When extradition has been granted with respect to an extraditable offense it shall also be granted in respect to any other offense specified in the extradition request that meets all other requisites of extradition except that set forth in paragraph (3) of this Article.

ARTICLE 3

Territorial Application

For the purposes of this Treaty the territory of a Contracting Party shall comprise all territory under the jurisdiction of that Contracting Party, including airspace and territorial waters.

ARTICLE 4

Political and Military Offenses

(1) Extradition shall not be granted when the offense for which extradition is requested is of a political character or is connected with an offense of a political character, or when the person whose extradition is requested proves that the extradition is requested for the exclusive purpose of trying or punishing that person for an offense of the above-mentioned character.

(2) Extradition shall not be granted when the offense for which extradition is requested is of a purely military nature.

(3) The Executive Authority of the Requested State shall decide on the application of this Article, unless otherwise provided by the laws of that State.

ARTICLE 5

Prior Jeopardy for the Same Offense

(1) Extradition shall not be granted when the person sought has been tried and convicted or acquitted by the Requested State for the offense for which extradition is requested.

(2) The fact that the competent authorities of the Requested State have decided not to prosecute the person sought for the acts for which extradition is requested or decided to discontinue any criminal proceedings which have been initiated shall not preclude extradition.

ARTICLE 6

Statute of Limitations

Extradition shall not be granted when the prosecution or the enforcement of the penalty for the offense for which extradition has been sought has become barred by lapse of time according to the laws of the Requesting State.

ARTICLE 7

Capital Punishment

When the offense for which extradition is requested is punishable by death under the laws of the Requesting State and the laws of the Requested State do not permit such punishment for that offense, extradition may be refused unless, before extradition is granted, the Requesting State furnishes such assurances as the Requested State considers sufficient that the death penalty shall not be imposed, or, if imposed, shall not be executed.

ARTICLE 8

Extradition of Nationals

(1) Neither Contracting party shall be bound to deliver up its own nationals, but the Executive Authority of the Request-

ed State shall have the power to deliver them up if, in its discretion it be deemed proper to do so. However, extradition of nationals will be granted pursuant to the provisions of this Treaty in the following instances:

(a) Where the offense involves acts taking place in the territory of both States with the intent that the offense be consummated in the Requesting State; or
(b) Where the person for whom extradition is sought has been convicted in the Requesting State of the offense for which extradition is sought.

(2) If extradition is not granted pursuant to paragraph (1) of this Article, the Requested State shall submit the case to its competent judicial authorities for the purpose of initiating the investigation or to further the related prosecution, provided that the Requested State has jurisdiction over the offense.

ARTICLE 9

Extradition Procedures and Required Documents

(1) The request for extradition shall be made through the diplomatic channel.

(2) The request for extradition shall be accompanied by:

(a) Documents, statements, or other evidence which describe the identity and probable location of the person sought;
(b) A statement of the facts of the case;
(c) The texts of the laws describing the essential elements and the designation of the offense for which extradition is requested;

(d) The texts of the laws describing the punishment for the offense; and
(e) The texts of the laws describing the time limit on the prosecution or the execution of punishment for the offense.

(3) When the request for extradition relates to a person who has not yet been convicted, it shall be accompanied by:

(a) A copy of the indictment or its equivalent issued by a judge or other judicial authority of the Requesting State;
(b) Evidence proving that the person sought is the person to whom the indictment or its equivalent refers; and
(c) Such evidence as would provide probable cause to suspect, according to the laws of the Requested State, that the person sought has committed the offense for which extradition is requested.

(4) When the request for extradition relates to a convicted person, it shall be accompanied by:

(a) A copy of the judgment of conviction imposed by a court of the Requesting State; and
(b) Evidence proving that the person sought is the person to whom the conviction refers.

If the person has been found guilty but not sentenced, the request for extradition shall also be accompanied by evidence to that effect and by a copy of the warrant of arrest.

If the convicted person has been sentenced, the request for extradition shall also be accompanied by a copy of the sentence imposed and a statement showing to what extent the sentence has not been carried out.

(5) All the documents to be submitted by the Requesting State in accordance with Articles 9 and 10 of this Treaty shall be translated into the language of the Requested State.

(6) The documents which accompany the extradition request shall be admitted into evidence when:

(a) In the case of a request emanating from the United States, they are signed by a judge, magistrate or other judicial officer and authenticated by the official seal of the Department of State and certified by a diplomatic or consular officer of the Republic of Colombia in the United States.

(b) In the case of a request emanating from the Republic of Colombia they are signed by a judge or other judicial authority and are certified by the principal diplomatic or consular officer of the United States of America in the Republic of Colombia.

(7) The Requested State shall review for legal sufficiency documentation in support of an extradition request prior to presentation to the judicial authorities and shall provide for legal representation to protect the interests of the Requesting State before the competent authorities of the Requested State.

ARTICLE 10

Additional Evidence

(1) If the Executive Authority of the Requested State considers that the evidence furnished in support of the request for

the extradition of a person sought is not sufficient to fulfill the requirements of this Treaty, that State shall request the submission of necessary additional evidence. The Requested State may set a time limit for the submission of such evidence and may grant a reasonable extension of the time limit upon application of the Requesting State setting forth the reasons therefor.

(2) If the person sought is in custody and the additional evidence or information submitted is not sufficient, or if such evidence or information is not received within the period specified by the Requested State, that person shall be discharged from custody. However, such discharge shall not bar a subsequent request for extradition for the same offense, and the person sought may be detained again. In this connection it shall be sufficient if reference is made in the subsequent request to the supporting documents already submitted provided these documents are available at the beginning of the new extradition proceedings.

ARTICLE 11

Provisional Detention

(1) In case of urgency, either Contracting Party may request, through the diplomatic channel, the provisional detention of an accused or convicted person. The application shall contain a description of the person sought, a statement of intention to present the request for extradition of the person sought and a statement of the existence of a warrant of arrest or a judgment of conviction against that person.

(2) On receipt of such an application the Requested State shall take necessary steps to secure the detention of the person sought.

(3) Provisional detention shall be terminated if, within a period of 60 days after the apprehension of the person sought, the Executive Authority of the Requested State has not received the formal request for extradition and the documents mentioned in Article 9.

(4) The termination of provisional detention pursuant to paragraph (3) shall not prejudice the extradition of the person sought if the extradition request and the supporting documents mentioned in Article 9 are delivered at a later date.

ARTICLE 12

Decision and Surrender

(1) The Requested State shall promptly communicate to the Requesting State the decision on the request for extradition.

(2) The Requested State shall give the reasons for the complete or partial rejection of the request for extradition.

(3) If the extradition has been granted, surrender of the person sought shall take place within such time as may be prescribed by the laws of the Requested State. The competent authorities of the Contracting Parties shall agree on the time and place of the surrender of the person sought.

(4) If a warrant or order for the extradition of a person sought has been issued by the competent authority and the person is not removed from the territory of the Requested State within such time as may be prescribed by its laws or, if the laws of the Requested State do not prescribe such time, within 60 days after notification of the extradition order to the Requesting State, that person shall be set at liberty and subsequently extradition may be refused for the same offense.

ARTICLE 13

Delayed Surrender

After the extradition request has been granted, the Requested State may defer the surrender of the requested person when that person is being proceeded against or is serving a sentence in the territory of the Requested State for an offense other than that for which extradition is sought, until the conclusion of the proceedings or the full execution of any punishment that person may be or may have been awarded.

ARTICLE 14

Requests for Extradition Made by Several States

The Executive Authority of the Requested State, upon receiving requests from the other Contracting Party and from a third State or States for the extradition of the same person either for the same offense or for different offenses, shall determine to which of the Requesting States it will extradite that person.

ARTICLE 15

Rule of Speciality

(1) A person extradited under the Treaty shall not be detained, tried or punished in the territory of the Requesting State for an offense other than that for which extradition has been granted, nor be extradited by that State to a third State, unless:

(a) That person has left the territory of the Requesting State after that person's extradition and has voluntarily returned to it; or
(b) That person has not left the territory of the Requesting State within 60 days after being free to do so; or
(c) The Executive Authority of the Requested State has consented to that person's detention, trial, or punishment for another offense, or to extradition to a third State, provided that the principles of Article 4 of this Treaty shall be observed.

These stipulations shall not apply to offenses committed after the extradition.

(2) If the offfense for which the person was extradited is legally altered in the course of proceedings, that person may be prosecuted or sentenced provided:

(a) The offense under its new legal description is based on the same set of facts contained in the extradition request and its supporting documents, and
(b) The defendant is subject to be sentenced to a period of incarceration which does not exceed that provided for the offense for which that person was extradited.

Article 16

Simplified Extradition

If the extradition of a person sought is not obviously precluded by the laws of the Requested State and provided the person sought irrevocably agrees in writing to the extradition after personally being advised by a judge or competent magis-

trate of that person's right to formal proceedings and the protection afforded by them, the Requested State may grant the extradition without the formal proceeding having taken place.

Article 17

Surrender of Articles, Instruments, Objects, and Documents

(1) To the extent permitted under the laws of the Requested State and subject to the rights of third parties, which shall be duly respected, all articles, instruments, objects of value or documents relating to the offense, whether or not used for its execution, or which in any other manner may be material evidence for the prosecution, may be surrendered upon the granting of the extradition even when extradition cannot be effected due to the death, disappearance, or escape of the accused.

(2) The Requested State may demand from the Requesting State, as a condition for the surrender, satisfactory assurances that the articles, instruments, objects of value and documents will be returned to the Requested State, as soon as possible or upon conclusion of the criminal proceedings.

Article 18

Transit

(1) The right to transport through the territory of one of the Contracting parties a person surrendered to the other Contracting Party by a third State may be granted on request made through the diplomatic channel if reasons of public order are not opposed to the transit.

(2) The Party to which the person has been extradited shall reimburse that Party through whose territory such person is transported for any expenses incurred by the latter in connection with such transportation.

ARTICLE 19

Expenses

Expenses related to the translation of documents and to the transportation of the person sought shall be paid by the Requesting State. All other expenses related to the extradition request and proceedings shall be borne by the Requested State. No pecuniary claim, arising out of the arrest, detention, examination and surrender of persons sought under the terms of this Treaty, shall be made by the Requested State against the Requesting State.

ARTICLE 20

Scope of Application

This Treaty shall apply to offenses encompassed by Article 2 committed before as well as after the date this Treaty enters into force. Extradition shall not be granted, however, for an offense committed before this Treaty enters into force which was not an offense under the laws of both Contracting Parties at the time of its commission.

ARTICLE 21

Ratification; Entry into Force; Denunciation

(1) This Treaty shall be subject to ratification; the instruments of ratification shall be exchanged at Washington as soon as possible.

(2) This Treaty shall enter into force on the date of the exchange of the instruments of ratification.

(3) On the entry into force of this Treaty, the Convention for the Reciprocal Extradition of Criminals of May 7, 1888, and the Supplementary Convention of Extradition of September 9, 1940, between the United States of America and the Republic of Colombia shall cease to have effect; however, any extradition proceedings pending in the Requested State at the time this Treaty enters into force shall remain subject to the previous treaties.

(4) Either Contracting Party may terminate this Treaty at any time by giving notice to the other Party and the termination shall be effective six months after the date of receipt of such notice.

IN WITNESS WHEREOF, the undersigned, being duly authorized thereto by their respective Governments, have signed this Treaty.

Done at Washington, in duplicate, in the English and Spanish languages, each text being equally authentic, this fourteenth day of September, 1979.

FOR THE GOVERNMENT OF THE UNITED STATES OF AMERICA:
CYRUS VANCE

FOR THE GOVERNMENT OF THE REPUBLIC OF COLOMBIA:
[Illegible]

Appendix

Schedule of Offenses

1. Murder; assault with intent to commit murder.
2. Manslaughter.
3. Malicious wounding; inflicting grievous bodily harm.
4. Rape; indecent assault.
5. Unlawful sexual acts with or upon children under the age specified by the laws of the Contracting Parties.
6. Willful abandonment of a minor or other dependent person when the life of that minor or that dependent person is or is likely to be injured or endangered.
7. Kidnapping; abduction; false imprisonment.
8. Extortion; blackmail.
9. Robbery; burglary; larceny.
10. Fraud, which includes obtaining property, money or valuable securities by false pretenses or by defrauding the public or any person by deceit or falsehood or other fraudulent means, whether such deceit or falsehood or any fraudulent means would or would not amount to a false pretense.
11. Embezzlement; breach of trust; graft.
12. Any offense against the laws relating to counterfeiting and forgery.
13. Receiving or transporting any money, valuable securities or other property knowing the same to have been unlawfully obtained.
14. Arson.
15. Malicious injury to property.
16. Offenses endangering public safety through explosion, flooding, or other destructive means.
17. Piracy, as defined by statute or by law of nations; mutiny or revolt on board an aircraft or vessel against the authority of the captain or commander of such aircraft or vessel.

18. Unlawful seizure of an aircraft or vessel.
19. Any malicious act done with intent to endanger the safety of any person traveling upon a railway, or in any aircraft or vessel or bus or other means of transportation.
20. Offenses against the laws relating to firearms, ammunition, explosives, incendiary devices or nuclear materials.
21. Offenses against the laws relating to the traffic in, possession, or production or manufacture of, narcotic drugs, cannabis, hallucinogenic drugs, cocaine and its derivatives, and other substances which produce physical or psychological dependence.
22. Offenses against public health, such as the illicit manufacture of or traffic in chemical products or substances injurious to health.
23. An offense against the laws relating to importation, exportation or transit of goods, persons, articles, or merchandise, including violations of the customs laws.
24. Offenses relating to willful evasion of taxes and duties.
25. Procuration.
26. Any offense relating to false testimony, perjury, or subornation of perjury.
27. Making a false statement to a government agency or official.
28. Offenses against the laws relating to the administration or obstruction of justice.
29. Bribery, including soliciting, offering and accepting.
30. Offenses against the laws relating to regulation of public administration or abuse of public office.
31. Offenses against the laws relating to the control of companies, corporations, or other juridical persons.
32. Offenses against the laws relating to control of private monopoly or unfair competition.
33. Offenses against the national economy, that is, offenses relating to basic commodities, or of securities and similar doc-

uments, including their issuance, registry, commercialization, trading or sale.

34. Offenses against the laws relating to bankruptcy.

35. Any offense against the laws relating to international trade and transfers of funds.

Excerpt from Grand Jury Minutes,
United States v. Keefe, November 15, 1979.

* * * * * * * * *

[9] *Reexamination by Mr. Lynn*:

Q Who did you get the marijuana from?

(Whereupon the witness leaves the grand jury room at 10:16 a.m. and returns at 10:17 a.m.)

A I'm sorry, but on the advice of counsel, I must respectfully decline to answer the question as any answer I may give may tend to incriminate me.

Q Who else, besides yourself, was involved in the unloading of marijuana from the Two Jims in May of 1979?

(Whereupon the witness leaves the grand jury room at 10:20 a.m. and returns at 10:21 a.m.)

A I'm sorry, but on the advice of counsel, I must respectfully decline to answer the question as any answer I might give may tend to incriminate me.

Q Was Richard Moore involved in the unloading of marijuana from the Two Jims, or in any way did he have knowledge of the fact that marijuana was going to be unloaded from the Two Jims?

(Whereupon the witness leaves the grand jury room at 10:23 a.m. and returns at 10:24 a.m.)

* * * * * * * * *

Excerpts from Grand Jury Minutes,
United States v. Moore, November 15, 1979.

* * * * * * * * *

[9] *Reexamination by Mr. Lynn*:

Q Who else, besides yourself, was involved in off-loading marijuana from the Two Jims?

THE WITNESS: I'm sorry. Excuse me.

(The witness leaves the grand jury room at 12:10 p.m. and returns at 12:11 p.m.)

A I'm sorry, but on the advice of counsel, I must respectfully decline to answer the question as any answer I give might tend to incriminate myself.

Q Does, or did Richard Moore have any knowledge or involvement in off-loading marijuana from the Two Jims?

(The witness leaves the grand jury room at 12:14 p.m. and returns at 12:15 p.m.)

A I'm sorry, but on the advice of counsel, I must respectfully decline to answer the question as any answer I give might tend to incriminate my -- incriminate me.

MR. LYNN: Okay. Would you step outside for just a moment?

(The witness leaves the grand jury room at 12:17 p.m.)

* * * * * * * * *

Excerpt from Transcript of Dispositions, October 9, 1979.

* * * * * * * * *

[6] of $114,000.00 segregated into money bags for individual employees on the pier. He was the author of the payoff list. At least that is what the FBI report handwriting expert testi-

fied to, and the fingerprint of Mr. Keefe was found on one of the money wrappers used to wrap the $114,000.00.

I might add this: the 100 pounds of marijuana he and Mr. Moore were seen unloading from that vehicle, that alone, the market value sold in pound bricks would be approximately $40,000.00, and that is a conservative estimate, at around $400.00 per brick. Of course, the payoff list itself indicates Mr. Keefe was to receive approximately $50,000.00 for his participation.

This man was a member of the Union Local. He is also a close relative of the business, which makes it suspect here that both the union and business have been compromised by this entire venture, and Mr. Keefe's role in that was one of a leader. There was no question here it was part of a large scale business in the northeastern part of Colombia. It involves mother ships that take many, many tons of marijuana from Colombia to the New England coast, and small vessels like "Two Jims" off-loaded a large amount. And the government indicated that the hold of this vessel could hold between ten and fourteen tons of marijuana. And, of course, the testimony during the trial, before it had been terminated by the defendants' pleas, indicated that there had indeed been a large quantity . . ..

* * * * * * * * *

Exerpt from Brief of Appellants in United States Court of Appeals for the First Circuit.

* * * * * * * * *

[11] the appellants are: (1) Article 38 of Decree 1188 of June 25, 1974 (published in The Diario Official of July 8,

1974). Article 38 proscribes the import, export, storage, maintenance, possession, manufacture, sale, offer, acquisition, or supply of marijuana without permission of competent authority. Such activity is punishable by imprisonment of from three to twelve (3-12) years, plus a fine of 5,000 to 50,000 pesos; (2) Article 208 of the Columbia Penal Code makes conspiracy to commit violations of Article 38 or 37, punishable by five to fourteen (5-14) years imprisonment; (3) Proposing to another the commission of a crime is punishable under Article 211 by imprisonment up to three (3) years; (4) Articles 16, 17, and 19 of the Code make attempting the commission of a crime or aiding or abetting the commission thereof a criminal offense, each one punishable by a term of imprisonment of several years.[5]

* * * * * * * * *

Rule 6 of the Federal Rules of Criminal Procedure.

Rule 6. [The Grand Jury.]

* * * * * * * * *

(e) [Secrecy of Proceedings and Disclosure.]

Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. Otherwise a juror, attorney, interpreter, stenog-

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[5]The above provisions are also cited in footnote 4, *In Re Grand Jury Proceedings. United States v Postal*, 559 F. 2d 234 at 236 (5th Cir. 1977).

rapher, operator of a recording device, or any typist who transcribes recorded testimony may disclose matters occurring before the grand jury only when so directed by the court preliminary to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. No obligation of secrecy may be imposed upon any person except in accordance with this rule. The court may direct that an indictment shall be kept secret until the defendant is in custody or has given bail, and in that event the clerk shall seal the indictment and no person shall disclose the finding of the indictment except when necessary for the issuance and execution of a warrant or summons.

* * * * * * * * *

United States Code, Title 18, §§ 6001-6003.

§ 6001. [Definitions.]

As used in this part —

(1) "agency of the United States" means any executive department as defined in section 101 of title 5, United States Code, a military department as defined in section 102 of title 5, United States Code, the Atomic Energy Commission, the China Trade Act registrar appointed under 53 Stat. 1432 (15 U.S.C. sec. 143), the Civil Aeronautics Board, the Federal Communications Commission, the Federal Deposit Insurance Corporation, the Federal Maritime Commission, the Federal Power Commission, the Federal Trade Commission, the Interstate Commerce Commission, the National Labor Relations

Board, the National Transportation Safety Board, the Railroad Retirement Board, an arbitration board established under 48 Stat. 1193 (45 U.S.C. sec. 157), the Securities and Exchange Commission, the Subversive Activities Control Board, or a board established under 49 Stat. 31 (15 U.S.C. sec. 715d);

(2) "other information" includes any book, paper, document, record, recording, or other material;

(3) "proceeding before an agency of the United States" means any proceeding before such an agency with respect to which it is authorized to issue subpoenas and to take testimony or receive other information from witnesses under oath; and

(4) "court of the United States" means any of the following courts: the Supreme Court of the United States, a United States court of appeals, a United States district court established under chapter 5, title 28, United States Code, the District of Columbia Court of Appeals, the Superior Court of the District of Columbia, the District Court of Guam, the District Court of the Virgin Islands, the United States Court of Claims, the United States Court of Customs and Patent Appeals, the Tax Court of the United States, the Customs Court, and the Court of Military Appeals.

§ 6002. [Immunity generally.]

Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to —

(1) a court or grand jury of the United States,

(2) an agency of the United States, or

(3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House,

and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may

not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

§ 6003. [Court and grand jury proceedings.]

(a) In the case of any individual who has been or may be called to testify or provide other information at any proceeding before or ancillary to a court of the United States or a grand jury of the United States, the United States district court for the judicial district in which the proceeding is or may be held shall issue, in accordance with subsection (b) of this section, upon the request of the United States attorney for such district, an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this part.

(b) A United States attorney may, with the approval of the Attorney General, the Deputy Attorney General, or any designated Assistant Attorney General, request an order under subsection (a) of this section when in his judgment —

(1) the testimony or other information from such individual may be necessary to the public interest; and

(2) such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination.

* * * * * * * * *

Supreme Court, U. S.
FILED
MAR 14 1980
MICHAEL RODAK, JR., CLERK

No. 79-1063

In the Supreme Court of the United States

OCTOBER TERM, 1979

STEPHEN FRANCIS KEEFE AND FRANCIS JOSEPH MOORE, III, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend (Pet. 5-6) that their contempt citations for refusing to answer grand jury questions violate the Fifth Amendment privilege against compulsory self-incrimination because their answer under a grant of use immunity could incriminate them in hypothetical foreign prosecutions.

1. In June 1979, petitioners were indicted in the United States District Court for the District of New Hampshire on three counts of violating the federal drug laws. These charges arose out of petitioners' unloading of a large quantity of marijuana from a small vessel (the "Two Jims") at the New Hampshire Port Authority Pier in Portsmouth, New Hampshire. On August 28 and 29, 1979, after trial had commenced, they pleaded guilty to

possessing marijuana with intent to distribute, in violation of 21 U.S.C. 841(a)(1). Petitioners thereafter moved to withdraw their guilty pleas. On October 4, 1979, the district court denied this motion, and petitioners' appeal from this order is currently pending before the court of appeals (Pet. App. 3a).[1]

Subsequent to their pleas of guilty, petitioners were subpoenaed to appear before a grand jury investigating the unlawful distribution of marijuana in New Hampshire (Pet. App. 3a). On the government's motion pursuant to 18 U.S.C. 6001 *et seq.*, the court issued an order granting petitioners immunity and compelling them to testify (Pet. App. 3a-4a, 8a). Petitioners moved to quash their subpoenas, claiming that the statutory grant of immunity did not adequately protect them from the possibility of future incrimination. In particular, petitioners suggested that their grand jury testimony might be used in a foreign criminal prosecution or at a subsequent federal trial, if the court of appeals should allow them to withdraw their guilty pleas. Petitioners did not, however, assert that they had been in, or violated the law of, any foreign jurisdiction, or that any foreign jurisdiction was planning to prosecute them. In addition, the government informed the court that it had not received any request from any jurisdiction, foreign or domestic, regarding the use of petitioners' grand jury testimony and that in any event, under Fed. R. Crim. P. 6, the government "would not consider complying with such requests" (Affidavit of Assistant U.S. Attorney Robert T. Kennedy para. 3 (Nov. 2, 1979)).

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[1]On October 9, 1979, the district court sentenced petitioner Keefe to four years' imprisonment and a special parole term of five years, and petitioner Moore to five years' imprisonment, which was suspended in favor of five years' probation, a $5,000 fine, and two years' special parole.

On November 9, 1979, the district court denied petitioners' motion to quash the subpoenas (Pet. App. 3a-9a). The court first noted that petitioners' grand jury testimony could not be used against them in any state or federal trial and that, if they succeeded in their effort to withdraw their pleas, the government would have the burden of demonstrating that any evidence used at a subsequent trial was not derived from or tainted by petitioners' compelled testimony (Pet. App. 4a-6a). The court further concluded that, regardless of whether Fed. R. Crim. P. 6(e) is an effective protection against the risk of foreign criminal liability based on compelled grand jury testimony, petitioner had failed "to particularize any real or substantial danger of foreign prosecution" (Pet. App. 7a).

Thereafter, on November 15, 1979, petitioners appeared separately before the grand jury. Each was advised of the order compelling his testimony under a grant of use immunity. Each claimed the privilege against compulsory self-incrimination and refused to answer questions regarding the identity of other persons who were involved in unloading marijuana from the "Two Jims" (Pet. App. 26a-27a). After a hearing, the court held petitioners in contempt and ordered them to be imprisoned for the duration of the grand jury or until they purged themselves of the contempt. The court of appeals summarily affirmed (Pet. App. 1a-2a).

2. Petitioners primarily contend (Pet. 5-6) that the grant of use and derivative use immunity is insufficient to protect them from the possible use of their testimony in a

criminal prosecution in a foreign jurisdiction.[2] But in *Zicarelli* v. *New Jersey*, 406 U.S. 472, 478 (1972), this Court held that the privilege against compulsory self-incrimination "protects against real dangers, not remote and speculative possibilities." Accordingly, the Court concluded that, even if the risk of foreign prosecution might in some instances implicate a witness's Fifth Amendment rights,[3] the witness in that case could be compelled to answer questions because he did not have "a real and substantial fear of foreign prosecution." *Ibid.* *Zicarelli* is controlling here, since, as both courts below found, petitioners have failed "to particularize any real or substantial danger of foreign prosecution" (Pet. App. 7a, 2a).

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[2]Question three of petitioners' questions presented suggests (Pet. 3) that petitioners cannot be compelled to testify so long as their appeal concerning their guilty pleas is pending. Petitioners do not argue this point in the body of the petition, however, and it is well settled that the statutory grant of immunity would fully protect petitioners in the event of such a trial. See, *e.g.*, *Kastigar* v. *United States*, 406 U.S. 441, 459-462 (1972); *In re Liddy*, 506 F. 2d 1293 (D.C. Cir. 1974).

[3]Several courts of appeals have concluded that a witness who claims a substantial possibility of foreign prosecution may nevertheless be compelled to testify before the grand jury, because of the protection afforded by Fed. R. Crim. P. 6(e). See, *e.g.*, *In re Federal Grand Jury Witness*, 597 F. 2d 1166, 1167 (9th Cir. 1979); *In re Grand Jury Proceedings*, 559 F. 2d 234, 236-237 (5th Cir. 1977), cert. denied, 434 U.S. 1062 (1978); *In re Parker*, 411 F. 2d 1067 (10th Cir. 1969), vacated as moot, 397 U.S. 96 (1970). Contrary to petitioners' suggestion (Pet. 5-6), there is no conflict among the courts of appeals on this point. Moreover, that issue is not in any event fairly presented by this case, since petitioners have not demonstrated a real and substantial threat of foreign prosecution.

Petitioners' claim of a substantial possibility of foreign prosecution rests solely on the prosecutor's comment at sentencing regarding petitioners' involvement in a marijuana scheme originating in Colombia (Pet. App. 28a).[4] The prosecutor did not suggest that petitioners were responsible for the large shipments of marijuana from Colombia, however. Indeed, petitioners have not asserted that they were ever in Colombia, much less that they may have violated Colombian law. Compare *Zicarelli*, *supra*, 406 U.S. at 478-479. In light of the nearly universal principle that criminal laws are not given extra-territorial effect, there is thus little possibility that Colombia would or could prosecute petitioners. *In re Quinn*, 525 F. 2d 222, 223 (1st Cir. 1975); *United States* v. *Doe*, 361 F. Supp. 226, 227 (E.D. Pa.), aff'd, 485 F. 2d 678 (3d Cir. 1973), cert. denied, 415 U.S. 989 (1974); see also note 3, *supra*. Moreover, petitioners have "totally failed to demonstrate that the [Colombian] authorities have any interest whatsoever in their prosecution" (*United States* v. *Yanagita*, 552 F. 2d 940, 947 (2d Cir. 1977)), and the government is unaware of any facts to the contrary. Finally, the grand jury questions that petitioners refused to answer concerned only petitioners' activities here in America—matters that do not give rise to a substantial fear of foreign prosecution. See *Zicarelli*, *supra*, 406 U.S. at 479-480; *United States* v. *Yanagita*, *supra*, 552 F. 2d at 946-947; *In re Quinn*, *supra*; *United States* v. *Doe*, *supra*.

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[4]Counsel for the government informed the court that petitioners had been caught unloading marijuana from their small boat and that such smaller vessels were used to off-load larger ocean-going vessels that were engaged in bringing large quantities of marijuana to this country from Colombia.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

MARCH 1980